It is respectfully requested that the applicant be granted leave to file a brief reply memorandum in support of Respondents' petition for rehearing, setting forth arguments on the above and related issues and why further briefing and argument should be had on the cause herein.

DATED: April 13, 1973.

JAMES J. CLANCY
Counsel for CDL

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-794

BARBARA SUSAN PAPISH,

Petitioner,

vs.

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents' Petition for Rehearing

STATEMENT OF THE CASE *

1. Academic History of Miss Papish

Barbara Susan Papish, the petitioner in the federal courts below, possessed a 1958 academic degree from the University of Connecticut at the time she was admitted to graduate

*Citations to the record in the Court of Appeals are designated herein as (Appendix, page ____).

school at the University of Missouri in September of 1963. For the next six years she attended school through the fall, winter and summer semesters and, at the time of her dismissal, which was effective on March 26, 1969, was making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, she was enrolled in a one-hour course entitled "Research Journalism" and in a three-hour course entitled "Ceramics 4." In the semester immediately preceding her dismissal, she was enrolled only in "Ceramics 3" (Appendix, pp. 48a, 49a). By letter dated Jan. 31, 1969, Miss Papish was placed on academic probation because of her prolonged submarginal academic progress, with the requirement that satisfactory work on her thesis be evidenced by presentation of several completed chapters of the thesis to her adviser by the end of the winter 1969 semester (Appendix, pages 16a,). On September 8, 1969, the Graduate School was notified by the School of Journalism that Miss Papish had not fulfilled the terms of her probation and that her candidacy for the Master's degree in Journalism had been terminated (Appendix 66a).

2. Disciplinary History of Miss Papish

In October of 1967, disciplinary charges were brought against Miss Papish alleging a violation of the general standard of student conduct embodied in Article V of the By-Laws of the University Board of Curators as her conduct related "to the distribution of 'New Left Notes' containing indecent words" (Appendix, page 42a). The charge arose out of an event which occurred on Oct. 14, 1967, University Day, while the University was engaged in an official activity of hosting high school seniors and their parents to acquaint them with the official educational programs and aspects of the University (Appendix, page 39a). *The specifications in 1967 for which she was found guilty (Appendix, page 42a) related to the distribution of "New Left Notes" containing indecent*

words, and read in part as follows (Appendix, pp. 39a-41a):

"1. Setting up and manning a table and distributing non-University publications in the area adjacent to the Memorial Union Tower area between the official University information table for University Day and buses used for campus tours in connection with University Day activity, thereby interfering with pedestrian traffic and obstructing University Day activities in this area after having been refused permission so to do and instructed and requested to cease and desist by University officials in the performance of their duties.

"2. Failing to comply with the requests of University officials in the performance of their duty to (a) vacate facilities reserved for use by University Day when requested to do so; (b) failure to cease distribution of non-University publications when requested to do so; (c) failure to identify yourself to a University official when requested to do so; (d) failure to exhibit your student identification card to a University official when requested to do so. * * * *

"5. Distributing non-University publications on University grounds titled 'New Left Notes,' published by Students for Democratic Society, containing pornographic, indecent and obscene words, 'fuck,' 'bull shit,' and 'shit's,' and 'The CIA at College: Into Twilight and Back,' containing a pornographic and indecent picture depicting two rats apparently fornicating on its cover to high school seniors and their parents who were the University's guests on University Day."

On November 1, 1967, the Faculty Committee on Student Conduct, consisting of 14 faculty members representing 14 Departments in 11 of the 16 Divisions of the University, after a hearing on the matter, found Miss Papish guilty of paragraphs 1, 2(a), 2(b) and para 5 as it related to the distribution of "New Left Notes" of the above specifications, and placed her on disciplinary probation for the remainder of her

student status at the University (Appendix, page 42a).

The "University Day" case, as it became known as, and the determination of the Faculty Committee on Student Conduct as to what constituted "indecent" forms of speech under Article V of the By-Laws of the Board of Curators were widely published and were well know on the campus. In February of 1969, they were personally known by Barbara Papish (Appendix, page 59a, Affidavit of Dean Matthews).

On February 11, 1969, approximately 15 months later, Ronald Pondrom, a law student at the University, made a complaint to Dean Matthews, the Dean of Students and the officer principally responsible for the administration of student discipline for initiating action against students (Appendix, page 56a), regarding literature then being distributed by the SDS at the information booth in the Memorial Student Union. The Memorial Student Union is referred to as the "crossroads" and the "living room" of the campus and it is through the Memorial Tower that virtually all student traffic between the Red and White Campuses of the University is funnelled at regular intervals during class breaks in the course of the ordinary University day. It is a place where students, prospective students, faculty, administrators, visitors, guests and family of the University community meet, congregate and visit between classes at the University, (Appendix, page 60a). Dean Matthews secured copies of the materials (Jan. 22, 1969 edition, Vol. 4, No. 3 of the SDS New Left Notes) being distributed and, after consulting with members of his staff and the University Legal Staff, and in view of the prior determination of the Faculty Committee on Student Conduct, determined that distribution of that publication contravened Article V of the By-Laws of the Board of Curators (Appendix, page 60a).

Dean Matthews then prepared a statement which read as follows (Appendix, page 61a):

"Members of the University SDS organization will

be permitted to continue with their scheduled use of information area space this morning. No objection will be interposed to the distribution of SDS literature, providing Article V of the By-Laws of the Board of Curators of the University of Missouri is not violated. (Section B of Article V states:)

"'Students enrolled in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe the GeneralStandards of Student Conduct. Obstruction of University teaching, research, administration or other activities, indecent conduct or speech, failure to comply with request of University officials, in the performance of their duties in violation of the laws of the city, state or nation are examples of conduct which contravene this standard.'

"The January 22, 1969, Volume IV, No. 3, edition of SDS-New Left Notes is not to be distributed. This particular issue of New Left Notes contains:

" 'Material' (Page 2 as an example) which contravenes the standards stated in Article V of the Board of Curators.

"Officers of SDS will be expected to appear before the Faculty Committee on Student Organizations, Government and Activities in the near future. The date for the meeting has not, as yet, been set.

"It is possible, as well, that students who can be identified as passing out publications containing 'vulgar' language may be invited to appear before the Faculty Committee on Student Conduct." (Our Emphasis)

On the following day, February 12, 1969, Dean Matthews ent to the Student Union and asked those manning the SDS ooth to accompany him into the adjoining room so that he

could read the statement to them privately and give them an opportunity to remove the publication, *page 2 of which contained a headline "Motherfucker Acquitted" without any reference thereafter appearing in the accompanying article (Appendix, page 62a).* A large crowd of students had gathered around the information booth, including the petitioner Barbara Papish. When *the people manning the information booth for SDS refused to accompany him to the adjoining room, Dean Matthews read the statement aloud, during which time Barbara Papish was present* (Appendix, page 62a). He specifically directed the attention of the group assembled to the headline "'Motherfucker Acquitted" and, without using the words, pointed out the headline as an example of that which would not be permitted to be distributed by SDS on the University of Missouri campus. His statement was recorded by local and student newspapers, radio and television media and received widespread publication and publicity (Appendix, page 62a). *Dean Matthews stated that it was his intention that, through his actions, all students would know that his direction related to the distribution of what he considered to be under the Board By-Laws an indecent form of speech.*

For several days thereafter the campus community widely discussed the Dean's action in the Student Union, and several confrontations relating to his statement forbidding the distribution of the material took place (Appendix, page 63a).

One week later, on February 19, 1969, at approximately 9:15 AM, Dean Matthews observed Herbert Markham and others actively selling copies of the February 1969, Vol. 4, No. 3 edition of the "Free Press Underground" *which contained on page 2 the same headline and the same article to which Dean Matthews, in the Student Union on February 12, 1969, had previously referred and had forbidden further distribution on the University of Missouri Campus.* The Dean purchased four copies from Markham and informed him he was in violation of the University rules and regulations prohibiting indecent speech. Markham left and went to the sidewalk adjacent to the apron.. (Appendix, page 63a)

Subsequent investigation revealed that Charles Fleisher, a Greyhound Bus Terminal employee, had loaded bundles of the "Free Press Underground" the night before into petitioner Papish's automobile, at Papish's request. (App. 63a)

3. The University Rule and Obscenity Charge

On March 12, 1969, Dean Matthews prepared a Notice of Disciplinary Charges and Hearing directed to Petitioner Papish, charging her with violating, on or about February 18 and 19, 1969, the General Standard of Student Conduct as set forth in Article V, Sections A and B of the By-Laws of the Board of Curators. (Appendix, page 64a) Paragraph B thereof reads as follows:

"Paragraph B: Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. Obstruction of University teaching, research, administration or other activities, indecent conduct or speech, failure to comply with requests of University officials in the performance of their duties and violations of the laws of the city, state or nation, are examples of conduct which would contravene this standard.

"This standard applies to all forms of student conduct and activity, and registration as a student constitutes full acceptance of the fundamental standard as well as other standards of conduct which may be adopted in implementation of this standard."

In the March 12, 1969 letter Miss Papish was charged with the commission of a second offense, while still on probation from punishment under the first offense. The letter charged her with:

"... violating on, or about February 18 and 19, at Columbia, Missouri, the General Standard of Student Conduct as set forth in Article V, Sections A and B of the

Board of Curators by failing to conduct yourself in a manner compatible with the University's functions and missions as an educational institution, in the following particulars:

> "*That while you were on a status of disciplinary probation you distributed* or aided and assisted in the distribution of the *Volume IV, No. 3, February 1969 edition of the Free Press Underground containing forms of indecent speech*, on the campus of the University of Missouri – Columbia, with knowledge of the contents of the publication, and *with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent*, and distribution thereof improper on the University campus under existing rules and regulations.'" (Appendix, page 9a) (our emphasis)

On March 26, 1969, a hearing was held before the Student Conduct Committee, which included 11 faculty members representing 11 departments in 8 divisions of the University and two students serving as full voting members of the committee. Evidence was adduced and the findings and the determination of the committee was addressed in a letter to Barbara Susan Papish, dated March 27, 1969, dismissing her from the University. (A64a) *The committee's findings indicate that the existing disciplinary probation status was a factor in its decision* (Appendix, page 11a). The decision was appealed to the Chancellor of the University and then to the Board of Curators and affirmed in each instance.

4. The Claim of Original Jurisdiction

In August 1969 Miss Papish brought her action in the United States District Court for the Western District of Missouri against the University Board of Curators and against certain University officials. The complaint sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), on the ground that Miss Papish's dismissal from the University was invalid

under the First and Fourteenth Amendments.

5. Dean Matthew's Trial Statement

The trial record shows that Dean of Students Jack Matthews stated as follows (Appendix, pages 64a, 65a) in support of the University disciplinary action:

"It is my opinion based on my twenty years' experience at the University as Dean of Students that the University has a legitimate interest in prescribing rules prohibiting the use of indecent forms of speech by its students and enforcing such a rule because indecent speech, in view of the free expression of ideas encouraged on the campus, disrupts students and the academic community and antagonizes citizens of this state who support the University. A large majority of our students, faculty, parents of our students and citizens of the state are not in sympathy with the distribution of materials containing indecent speech on the campus. Without their support, freedom of thought and expression cannot be effective on the campus. The regulation prohibiting indecent speech encourages, rather than discourages, freedom of thought and expression on the campus. It is necessary to preserve decorum and good order on the campus. High standards of conduct and behavior, especially in students' out-of-class activities and programs, must be maintained because it is usually the case that within the classroom there is little teaching done which relates to the improvement of the overall general character of the individual student. While not a great deal can be done in extracurricular activities to accomplish this, what can be done should be done, and the University must be constantly concerned with any behavior which has a tendency to lower the general standards of good conduct of our students.

"In my years of employment with the University, now numbering 35, and the last 20 years having been engaged as the Dean of Students in working very closely with students, faculty and staff, and in traveling around the state speaking to alumni groups and other types of organizations, I have been impressed with the loyalty of all the people with whom I have come in contact for their state university. There are many factors which have contributed down through the years to this high regard, respect and loyalty to the University. However, I believe one of the important factors in generating this feeling is the result of the fact that we have always tried to maintain on the University campus high standards of conduct for our students. I repeat, the strong support given the University down through the years, in my opinion, has a direct relationship to the manner in which the University has attempted to maintain the best possible climate or environment for our students. To seem to depart from the high purposes which we have held in the past by permitting on campus distribution of indecent forms of speech would have a bad effect upon the overall morale of the student body and our faculty as well and, in addition, we would lose much in the way of support from parents, alumni and the general public throughout the state."

6. Chancellor Schwada's Trial Statement

Also testifying in support of the University's action, Chancellor Schwada stated (Appendix, pages 53a-55a):

"8. In the event the Court should grant the preliminary injunction prayed for by Barbara Susan Papish in this case, pending its final disposition, such action would in my opinion be damaging to the University's educational philosophy and to its program of administration of student affairs on the campus. Such an action would open to question in the minds of students, faculty

and staff the validity of the rules and regulations and disciplinary arrangements within the University and would jeopardize the immediate effectiveness of the University's entire student affairs system by placing its validity in doubt. The entire University community would be left with questions as to the nature and basis for future University disciplinary actions at a time when the present fall semester is commencing, which would cause immediate and probably irreparable damage to the University. Additionally, in view of Plaintiff Barbara Susan Papish's previously displayed lack of urgency in securing her stated academic objectives, there would seem to me no sufficient reason for expediting her continued pursuit of her stated academic objectives in view of the immediate and irreparable damage which might result to the University if the preliminary injunction should be granted.

"9. The University has a vital educational interest in the forms of speech and press presentations employed by its students on the University campus. A significant function of the University is to further the concept of orderly, rational presentation of arguments pro and con on virtually all issues, and it is expected and generally believed that the educational community possesses exceptional ability to present and discuss issues without resort to the utilization of emotion producing, shocking, or indecent forms of speech. It is important that the University teach its students to discuss the issues utilizing socially accepted forms of speech. I know of no newspaper in general circulation in this state which has or would have printed the word raised in this case (and most especially in the manner it appears in the questioned publication), and the use of that or comparable words is not commonly accepted practice within the broader community. Additionally, the educational philosophy which prevails within

the University communities asserts that learning is not limited to the classroom alone, but takes place through the campus. If this proposition, supported by students and faculty, is true, then the University has, in my opinion, an appropriate concern with the quality of activities in the University community. The indiscriminate employment of indecent forms of speech in presenting issues for discussion on the University campus can be prohibited in furtherance of this educational philosophy.

"10. The general public expects, and rightfully so in my opinion, that although wide range of discussion of issues is encouraged by the University indecent forms of speech should not be employed in these discussions, and unless the University opposes the use of indecent forms of speech the public assumes that the University in fact supports, sanctions, endorses, and protects such forms of speech as part of the learning process within the University. The public reaction in this case was overwhelmingly in favor of the actions taken by the University. Of the something over 100 letters received, only 2 were in any way critical of the University's position, and most were warmly and vigorously in support of it. The University has a vital interest in encouraging the general support of the University by citizens.

"Additionally, if the University permits the distribution of indecent forms of speech on its campus, students accept that which is being distributed as in keeping with the University's attitude and philosophy toward the learning process.

"The University can legitimately expect, in my opinion, a higher standard of thought, expression and discrimination in the use and presentations of ideas than can be expected of the broader society beyond the campus.

Those in attendance are expected to be able to express themselves intelligently, and it is a legitimate purpose of the University to teach students how to discuss intelligently any issue utilizing generally accepted forms.

"11. A significant share of the students at the University of Missouri - Columbia have neither the years nor the experience of Barbara Susan Papish and therefore may not have yet gained the understanding and maturity essential to a careful analysis of that which they may read or hear. Seventy-two per cent of the undergraduate students enrolled on the Columbia campus last fall were under the age of 21 years, and over twenty-five per cent were first time freshmen directly out of the high schools of this and other states.

"12. In order to preserve and encourage within the University community the inordinately free expression of thoughts and ideas, the University may legitimately insist, in my opinion, as a very minimal restriction that the thoughts and ideas be expressed without the utilization of indecent and generally unacceptable forms of speech."

7. Miss Papish's Defense

Miss Papish's defense to the foregoing appears at paragraphs 3-8 of her verified affidavit, filed in the trial court (Appendix, pages 22-24):

"I am a member of the staff of the 'Free Press Underground,' a newspaper published by the Columbia Free Press Corporation, a non-profit corporation organized under the laws of Missouri. The 'Free Press Underground,' which has been published since 1965, disseminates news and opinion of general interest about University, local and world affairs. The paper generally is published monthly during the school year, and is distributed on the University campus and elsewhere. Written permission to distribute the paper on campus was obtained from

the Business Officer of the University on April 30, 1967, in accordance with University regulations."

"On February 19, 1969, I and a number of other students took part in the distribution of Volume IV, No. 3, February 1969 edition of the 'Free Press Underground' on the Columbia Campus of the University, in front of the Memorial Union. Although no disruption of the University's functions occurred in connection with the distribution of the newspaper, I and three other students who were involved in its distribution were arrested, at the instigation of the University.'[10A]

"The February 1969 edition of the 'Free Press Underground' contained two features which the University later contended were 'indecent.' The front cover duplicated a political cartoon which appeared in the February 1969 edition of 'The Movement,' a liberal paper of national circulation. The cartoon shows helmetted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice. The cartoon is captioned '. . . With Liberty and Justice for all' To me, the cartoon depicts and symbolizes the evils of authoritarian brutality. As I said in an article in the 'Free Press Underground,' 'Someone might consider the cartoon on the cover of this issue 'vulgar.' It is not; it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; napalm is the greatest obscenity of the 20th century; and administrators who fear a different view are also obscene.' The theme of the cartoon is purely political, and the University's act of labelling

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[10A] Miss Papish offered no evidence on this allegation, and both Chancellor Schwada and Dean of Students Matthews positively denied the University's participation in the arrests. (Appendix page 52a, 57a,)

it 'indecent' can be viewed as political censorship." "

"The second feature of the issue which the University objected to was an article concerning the acquittal of a young New Yorker after a trial for assault and battery by means of dangerous weapon. That article was reprinted from a political newspaper, the 'New Left Notes.' The article, which discussed the trial, the composition of the jury and similar matters, was headlined 'Motherfucker Acquitted.' The subject of the article is Ben Morea, the leader of a group in New York's Lower East Side called 'Up Against the Wall, Motherfucker,' also known as 'The Motherfuckers.' This group is an organization purportedly dedicated to the self-defense of poor people from police and bureaucratic harassment. The headline, 'Motherfucker Acquitted,' was intended to describe Morea's organizational affiliation. In that context, which should have been understood by our readers, the word 'Motherfucker' has absolutely no sexual or indecent connotations."

8. The Federal Decision's Below

The District Court denied relief on the grounds (1) that

"The statement of Miss Papish, made in her defense, that " . . . it is obscene. But it is a social comment concerning a greater obscenity," presents the same error in logic that some members of this Court have made. She suggests that when one is communicating, he or she may use obscenity for shock value to make a social point, like kicking a mule to get its attention. That principle, however, is the very opposite of what *Roth-Alberts*, 354 U.S. 476, 1 L.Ed.2d 1498, 1507, 77 S.Ct. 1304 (June 24, 1957) had to say. See *Roth-Alberts* at page 1507 where that Court cited and emphasized the following language of *Chaplinsky v. New Hampshire*, 315 U.S. 567:

"It has been well observed that such utterances *are no essential part of any exposition of ideas*, and are of such slight social value as a step to truth that *any benefit that may be derived from them is clearly outweighed by the social interest in order and morality* . . . . "

Miss Papish "does not have a federally protected or other right to attend a state university of a state of which she is not a domiciled resident or citizen" and (2) that "the conduct of plaintiff for which she was dismissed is not within First Amendment protection," and that the newspaper was obscene under federal standards, both as distributed and abstractly on the issue of obscenity vel non. *Papish v. Board of Curators of the University of Missouri*, 331 Fed. Supp. 1321, 1326 (1971).

In the Court of Appeals, Miss Papish mounted an attack on these findings along three principal lines: *First*, she asserted that her dismissal is improper because it rests solely upon her exercise of freedoms which the First Amendment guarantees. *Second*, it was argued that paragraph B of Article V of the By-Laws of the University Board of Curators is invalid because it is impermissibly vague, and because its language demonstrates a potential for sweeping improper applications posing a substantial likelihood of deterring important First Amendment freedoms. *Third*, the contention was made that Miss Papish's residence is irrelevant to her claim that University officials acted in violation of her constitutional rights. That being so, it was said that the District Court erred in its finding that Miss Papish was precluded from obtaining relief because, due to her Connecticut residence she did not possess a federally protected right to attend the University of Missouri. The Court of Appeals affirmed in *Papish v. Board of Curators of the University of Missouri*, 464 F.2d 136 (June 15, 1972), but did so on the limited ground that the magazine was obscene as "distributed on its open campus" without deciding the obscenity vel non issue. (ie. whether it must be made available in its book stores) See 464 F.2d 136, at 144, para. 3 and 145, first full paragraph.

8. The U.S. Supreme Court's Decision

On November 29, 1972, Papish filed a petition for writ of certiorari and on December 29, 1972, respondent filed a brief in opposition. On March 19, 1973, this Court (Chief Justice Burger and Associate Justices Blackmun and Rehnquist dissenting), without examining the record, granted the petition, reversed the judgment and remanded the case to the District Court with instructions to order the University to restore to petitioner any course credits she earned for the semester in question and to reinstate her as a student in the graduate program, unless she was barred from reinstatement for valid academic reasons.

REASONS FOR GRANTING REHEARING AND RESTORING CASE TO DOCKET FOR ARGUMENT

I.

PAPISH HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COURT HAS ORIGINAL JURISDICTION.

(A) 42 USC Section 1983 Does Not Encompass A Civil Action To Review School Administrative Practices Where The Allegation of Due Process Denial Is Unrelated To Racial Discrimination.

1. The Jurisdictional Question Has Not Yet Been Decided By This Court.

In her petition for a writ of certiorari at page 1, Papish asserts 28 USC Section 1254(1) as the jurisdictional basis for this Court's review. But appellate jurisdiction to review a civil case in the Court of Appeals presupposes proper original jurisdiction in the federal court system in the first

instance. See *Farrell v. Joel, Jr.*, 437 F.2d 160 (2nd Cir. Jan. 20, 1971), a civil rights case based upon 42 USC Sect. 1983, to review school administrative practices, where Circuit Judge Feinberg, speaking for the Second Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that her complaint states a viable action under the Civil Rights Act, 42 USC Sect. 1983 and its jurisdictional counterpart, 28 USC, Sect. 1343(3). It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption . . . ."

The Second Circuit noted thereafter the unusual status of the law in the Eighth Circuit (where *Papish* was decided).

> "In the United States District Court for the Western District of Missouri, the four district judges *took the extraordinary step of convening an en banc court, which promulgated a General Order* on Judicial Standards of Procedure and Substance In Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 FRD 133 (W.D. Mo., 1968)." (Our emphasis.)

Unfortunately, the Second Circuit chose to avoid that issue, at page 162:

> "This Court does not seem to have ruled on the precise issue. See Madera v. Bd. of Education, 386 F.2d 778 (2d Cir. 1967), cert. denied 390 U.S. 1028, 88 S..Ct. 1416, 20 L.Ed.2d 284 (1968), but we will assume arguendo that due process applies where a publicly financed educational institution - whether college or high school - imposes a mild, as well as a severe, penalty upon a student."

That the scope of this problem is wide enough to warrant a more comprehensive review than was accorded herein, can be seen from the disagreement of federal judges as to the role of the federal court in such cases. Does the trial court "review

student discipline by school officials?" or is there a "separate proceeding which requires a trial de novo on the claim relating to a denial of federal rights?" See Circuit Judge Lay's dissent in *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1090, et seq. (8th Cir. Aug. 28, 1967). Moreover, if the proper procedure is "a plenary evidentiary hearing de novo" as Chief Judge Becker concluded in his trial court opinion, see *Papish v. Board of Curators of University of Missouri* 331 F. Supp. at 1323, has this Court acted properly in deciding this case without examining the *entire* record made in the federal district court? See Point II, Infra,

2. *The Congressional Purpose in Passing the Civil Rights Act of 1871 (43 USC Sect. 1983) was to Prevent Racial Discrimination. It Was the Intent of Congress at That Time That 43 USC Sect. 1983 Should Not be Interpreted as a General Federal Tort Law Authorizing Federal Lawsuits Against School Administrative Practices.*

To make the Federal District Court a trial court for every campus activity reaches a result never intended by Congress when it enacted the 1871 Civil Rights legislation. On this issue, the Court cannot avoid the implications of its rationale in *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed.2d 338, 91 S. Ct. 1790 (June 7,1971), where, in upholding federal jurisdiction under the Civil Rights Act of 1871 (43 USC Sect. 1985) in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspirators' actions, at page 348:

"It is thus evident that all indicators – text, companion provisions, the legislative history – point unwaveringly to § 1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, *they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery* when committed by two or more persons within a State.' Id. at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100 29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means *that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.* The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Our emphasis.)

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC Sect. 1985; (2) *the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871.* In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section

1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of *all* deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation *as a whole* (Sections 1983 and 1985) and noted at at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into section 1985(3) would thus deprive that section of all independent effect . . . .* Given the existence of these three provisions, *it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them . . . .*" (Our emphasis.)

It seems logical that if Sections 1985 and 1983 are to be read together and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus" then certainly the reach of Section 1983 is not so broad as to make the federal district courts in Missouri trial courts to review de novo all school administrative practices in the state of Missouri.

II.

ASSUMING THAT A CLAIM HAS BEEN STATED AS TO WHICH THE FEDERAL DISTRICT COURT HAD ORIGINAL JURISDICTION, STILL THIS COURT ERRED IN REVERSING THE TRIAL COURT JUDGMENT WITHOUT EXAMINING THE ENTIRE RECORD UPON WHICH THAT JUDGMENT WAS BASED.

If this Court is dissatisfied with the law which the lower court has applied to the facts, as this Court has gleaned those facts to be from the opinions below (not all of the facts are recited in the opinions below), must it not then take a look at the *entire factual record* so that it may search for the correct rule of law which applies *to all of the facts?* The "per curiam" recitation at footnote 5 that "as the Court of Appeals' opinion states, 'The facts are not in dispute,' " completely ignores the fact that an appellate court is not justified in relying upon such unsupported "conclusions" in the opinion being reviewed where, as here, the record shows that the decision rests upon controverted facts. It is submitted that, in the decision making process, the per curiam justices cannot arrive at a judgment without examining *all* of the facts – and not all of the facts appear in the opinions below. It is not unreasonable to expect that several of the per curiam justices, when made aware of the true nature of the record and certain undisclosed facts, may reach a different conclusion on whether or not the facts are in dispute.

As just one example in support or this latter proposition, consider the factual issue as to what Miss Papish intended by the use of the "Motherfucker" article and why the bold headline was used. Was it legitimate journalism or was it open and wilful defiance of campus discipline and a libel by innuendo hurled at the School administration? In her af-

fidavit, Miss Papish stated (Appendix, p 24a):

"The headline, 'Motherfucker Acquitted' was intended to describe Morea's organizational affiliation. In this context, which should have been understood by our readers, the word 'Motherfucker' has absolutely no sexual or indecent connotations . . . ."

Dean Matthews, however, viewed the matter differently. In his affidavit (Appendix, page 62a), which is not mentioned in the opinion, he noted:

". . . page 2 of which contained a headline 'Motherfucker Acquitted' without any reference thereafter appearing in the accompanying article . . . ."

and on cross-examination, testified as follows (Appendix, page 94a) (also not mentioned in the opinions):

" Q. Yes, Sir, and in making that decision did the context in which that particular word appeared, was that significant to you?

" A. It seemed to be totally unrelated to the material below the headline. And it seemed to have no relationship and it seemed to be in the paper for some – I don't know why . . . ."

Amicus submits that when Miss Papish's explanation is viewed in the background of her repeated wilful defiance of authority on the University of Missouri campus,[12] it is obvious that she is speaking with a "forked tongue" and that in truth, the headline was intended as a libel by innuendo on the school

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[12] See Statement of facts, supra at pages 14 - 19. Note that Miss Papish introduced the term *three times* to the University campus. On cross examination Dean Matthews stated that it was also the subject of the 1967 charge. "So . . . I made a judgment on what I saw and the lack of relationship *and the use of these, of this word, which, as I repeat, had already been judged indecent* by Faculty Committee representing, I believe 14 of our 16 divisions on the campus in *1967* . . ." (our Emphasis) (Appendix, page 94a).

administration. To find the answer to this question and the real reason for the article, the members of this Court need look no further than the record and plaintiff's own evidence in the trial court below. In Plaintiff's Exhibit 1, the author of the Atlantic Monthly article, in tracing the use of that obscene term by the SDS, suggests that what Miss Papish "mouthed" is really window dressing and camouflage, commonly known as *"a public explanation"*, and that the *real popularity of the slogan* on the campus lay in the students' "feelings about their adversaries,:: - "police, city officials, administrators, and faculty." See Plaintiff's 1, appearing at Appendix 146A (No mention having been made of it in the opinions):

". . .I make no claim to full understanding of the complete psychological and cultural journey this phrase has undergone. But let me at least sketch in a few steps along the way: . . ."

"6. *The slogan's full flowering* during the course of the Columbia strike, both in abbreviated and complete form, in shouted student chorus, for confronting just *about all representatives of what was considered negative authority – police, city officials, administrators, and faculty.* Rudd has claimed that his group adopted the slogan 'in order to demonstrate our solidarity with the blacks and our understanding of the oppression they have been subjected to.' *But other student-strikers told me this was 'a public explanation.' They attributed the slogan's popularity to the students' general mood and feelings about their adversaries; and also to the presence of a few members of the East Village group.* One, known as John Motherfucker, was constantly in view, wearing his 'club jacket' with the organization's name lettered on it, and advocating even greater militancy. He became an object

of both humor (other students thought his ideas 'crazy') and affection." (our emphasis)[13]

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[13] If the Per Curiam opinion is to stand, what can the University of Missouri administration do when the "John Motherfucker" club jackets appear on the campus? See Motion of Charles H. Keating Jr. for Leave To File a Brief as Amicus Curiae In Support of Appellee's Petition for Rehearing in *Cohen v. California*, Oct. Term 1970 No. 299 at page 5 wherein the following argument appears:

> If, in spite of this nation's laws outlawing "lewd conduct", an individual has an absolute right to broadcast to the public his opposition to any cause or principal by employing lewd language such as "F__the (cause or principal)" and "the State may not, consistently with the First and Fourteenth Amendment, make the public display of such a single four-letter expletive a criminal offense" and the public (in this case, those in the Los Angeles Court House) are required to "avoid further bombardment of their sensibilities simply by averting their eyes" because the state cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process" then surely Justice Harlan's opinion has opened Pandora's Box, and in the same stroke succeeded in painting this Court into a corner. See Rule 40(5) of the Rules of the Supreme Court of the United States which provide in part, as follows:
>
> "5, Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court . . ."
>
> In the light of the *Cohen* rationale, how can this Court justify the limitations on free speech imposed by Rule 40(5)—particularly, in light of the fact that the business of the Supreme Court offers a forum which symbolizes the essence in the exchange of ideas. If the State cannot regulate objective "lewd conduct" in the public corridor of its buildings, how can this Court accomplish that task in its own Courtroom "without also running a substantial risk of suppressing ideas in the process?" or, as in the case of the legendary fable of "The Partial Judge," does the answer to the constitutional question depend upon whose ox is gored. What is this Court prepared to say the rule of law will be when some disgruntled person, be he litigant or observer, decides to don his jacket in the manner of Cohen, and broadcast a message to the members of this Court and the spectators in attendance. This is not a fanciful inquiry, for only a naive person would fail to recognize the historical significance of the tool of "lewdness" as an instrument of revolution. See *Dillingham v. State of Maryland*, 267 A. 2d 277 (July 15, 1970) where the editor of the Washington Free Press resorted to "lewdness" in his attack on a trial judge."

III.

THE PER CURIAM OPINION IS IN ERROR IN REFUSING TO LOOK AT THE RECORD AND IN CONCLUDING, FROM THE LIMITED FACTS WHICH APPEAR IN THE OPINIONS BELOW, THAT "THE STATE UNIVERSITY ACTION CANNOT BE JUSTIFIED AS A NON-DISCRIMINATORY APPLICATION OF REASONABLE RULES GOVERNING CONDUCT."

A. The Record Presents an Obscenity Case Involving Unlawful Student Conduct, and All Three Agencies: The University, The District Court and the Court of Appeals Treated It As Such in Their Rulings on The Matter.

1. The Obscenity Issue: Underground Newspapers.

Contrary to what one would be led to believe from a reading of this Court's per curiam opinion, the *Papish* case, properly interpreted, focuses on a major obscenity issue not heretofore considered by this Court in oral argument; namely (1) how to treat the underground publications whose publishers incorporate obscene articles as a part of the whole for the purpose of attracting attention to political arguments made therein, and (2) how to treat the distribution of such publications by vendors, when they are sold and distributed, both with knowledge of the contents and with such "pandering" purpose in mind.

As to the first problems, dealing with the "publisher", see the problem in a nutshell in *Joseph R. Kois v. Breier*, 312 F.Supp. 19 at pp. 24, 25 (May 5, 1970), where Judge Reynolds recognized the problem but failed to comprehend the solution. Compare the scandal-giving result reached by this Court in *Kois v. Wisconsin*, 408 U.S. 229, 33 L.Ed.2d 312, 92S.Ct____(June 26, 1972), arrived at without brief-

ing or oral argument (and, it is submitted, without adequate reflection on the merits) with the praiseworthy solution arrived at by England's highest court in the celebrated "Oz" case in *R. v. Anderson and others*, 3 All E.R. 1152 (Nov. 3, 4, 5, 1972), a copy of which is attached hereto at Appendix A. It is unfortunate that when *Kois, supra*, was first considered by this Court in conference last term, there were not the required four votes to call for full briefing and oral argument on the merits on this major issue in the first instance.

The latter problem, involving "vendors" was the obscenity issue which faced the University of Missouri officials on the campus and, contrary to the conclusion drawn in the per curiam opinion, *that was the matter decided by both the District Court and the Court of Appeals below.*[14]

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[14]The per curiam statement at page 3 that: "The District Court's Opinion rests, in part, on the conclusion that the banned issues of the newspaper was obscene. *The Court of Appeals found it unnecessary to decide that question . . . .*" (Our Emphasis.) ignores the plain language of that opinion and indicates that the author completely misunderstood the language employed by, and the analysis of, the Court of Appeals, which differed only slightly from the District Court's analysis. There is a basic difference between "obscenity vel non" or "constant" obscenity concepts and "variable" obscenity concepts, the latter of which comes into clear focus when one tests the constitutionality of any statute, ordinance, or rule as applied, specifically, to a given subject matter in terms of time, place and manner of distribution, which is what the Court of Appeals decided. See *U.S. v. Rebhuhn*, 109 F.2d 512, cited with approval in *Ginzburg v. U.S.* 383 U.S. 463 at 472.

Although the per curiam opinion recognized what the Court of Appeals was saying, *its fatal error was in its failure to look beyond the facts set forth in the opinion to the record itself.* See page 4, where the per curiam opinion observes:

> "There is language in the opinion below which suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory

2. The District Court Solution.

District Court Judge Becker analyzed the trial facts as presenting a *Ginzburg v. U.S.*, 383 U.S. 463, 16 L.Ed.2d 3, 86 S.Ct. 942 (March 21, 1966) type obscenity case involving "pandering" [18] and held that, since it was clear that the *obscene portion* of the newspaper was used to

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authority, e.g., 408 U.S. at 192-193, *the facts set forth in the opinions below* show clearly that petitioner was dismissed because of the disapproved content of the newspaper rather than the time, place or manner of its distribution."
(Our emphasis.)

Amicus submits that the Court had a clear duty to examine the record in the trial court and come to its own conclusions.

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[18] Beyond doubt, the most incomprehensible part of the per curiam opinion appears in footnote 6, containing the per curiam's reply to Justice Rehnquist's dissent that Papish was engaged in "pandering" and reading:

"The opinion (District Court) makes clear, however, that the reference to 'pandering' was addressed to the content of the newspaper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated . . . ."

Amicus is able to perceive no difference between Ralph Ginzburg's "chip on the shoulder" attitude in mailing his sexually oriented publications "Eros," "Housewife's Handbook on Selective Promiscuity" and "Liaison" to priests, nuns, rabbis, community organizations, boy scout groups, etc., in defiance of community standards, and Susan Papish's distribution of the Free Press underground magazine with headline and other gross content like "Motherfucker Acquitted," at the crossroads of the University of Missouri campus (where the offsprings of the families of this Nation are assembled for the purpose of betterment) in repeated, deliberate defiance of the University of Missouri's rules of conduct on the campus.

The reason for including such sexual content in underground newspapers is a matter of common knowledge and differs not from Ginzburg's motives. In Issue Number 1 of the Students Resistance Federation, published in New York City, with mailing address, "Free Student," c/o Apt. 4, 336 East 4th St., New York 9, N.Y., dated March 1964, the following advice appeared:

"pander" the publication, taking into account the age of the enrollment at the University (Footnote 6 of his opinion reads, "University records show some 1031 students enrolled for the 1968 Fall Semester under 17 years of age), *Papish* had no constitutional right to disseminate her *entire* "publication *anywhere* on the University of Missouri campus. In this regard, compare the approach employed by the English Court of Appeal in *R. v. Anderson et al.*, at page 1158, a copy of which appears herein at Appendix A, with the analysis and result reached by Judge Becker in *Papish v. Board of Curators of University of Missouri* 331 F. Supp. 1321 at 1329.

"The Students Resistance Federation is a student federation organized to promote libertarian alternatives to the existing authoritarian teacher-pupil relationship prevalent in the private boarding and day school systems in the U. S. Recognizing that an unrestricted atmosphere of enquiry and debate is the only basis for a free and human education, we reject, and shall fight on the campuses, if necessary, all restrictions on sexual freedom, compulsory religious worship . . . basic civil liberties, and the dictatorial faculty and headmaster control . . . ."

"What can we do? First, of all, organize. GET WISE-- ORGANIZE! They are, — so why shouldn't we? Then try some of the following to begin with:

–Boycott the farcial 'student council' elections.

–Boycott the school stores, snack shops, etc. Most of them charge too damn much anyway. Have the students buy on the outside.

*–Pressure the librarian into buying some good pornography for the school library. If he refuses, bring it in yourself.*** If you can really get organized on your campus, and built a majority of the students behind you, you can try the following for good results:*

–Publish an insulting satire magazine. You can do this anyway, in secret, if you have to.

–Mass boycott of daily and/or Sunday chapel until the administration makes religious worship strictly voluntary.***"
(Our emphasis.)

Those members of this Court who do not recognize the above type of conduct as "pandering" are indeed naive.

"The maintenance of a decent atmosphere in the area of Memorial Tower and the adjacent Student Union and chapel, and the protection of persons there from pandering indecent publications is a lawful mission of the University. Further, it is apparently plaintiff's conclusory contention that the distributed material is not 'obscene' because, in accordance with the opinion of her witnesses, the material had, in terms of Roth, 'redeeming social value.' As noted above, in considering what is obscene, this Court may take into account what is emphasized in the sale and distribution of the materials by the purveyor of the allegedly obscene materials. In Ginzburg v. United States supra, 338 U.S. at 465, 86 S.Ct. at 944, 16 L.Ed.2d at 35, the United States Supreme Court held that 'the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity.' Further, in Ginzburg, it was the ruling of the Supreme Court that, even in the case where a book may have social worth in a 'controlled, or even neutral, environment,' the work was without the ambit of First Amendment protection when:

> " 'Petitioners * * * did not sell the book to * * * a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity, * * *' "

In Gable v. Jenkins (N.D.Ga.) 309 F.Supp. 998, affirmed 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595, the rule of Stanley v. Georgia, supra, was held not to invalidate a Georgia statute forbidding the dissemination of 'obscene materials' by any person. The same is true in this case, particularly with regard to the news story headlined,

'Motherf _____ Acquitted.' Assuming, without holding, that the story itself may be of redeeming social importance, that aspect was not made most prominent by the arrangement of the news article; rather, the obscene aspect was emphasized and featured in bold face type. The cartoon of policemen raping the Statue of Liberty and the Goddess of Justice features the crude, vulgar and obscene, obscuring any political or social commentary which might incidentally be made. This is particularly true in the University environment in which a substantial portion of the University population is under the age of 18 years and thus does not constitute the 'controlled environment' in which such a cartoon might be considered as predominantly a social commentary. The University community, which is mainly comprized of younger and less sophisticated persons than those mature persons who are interested in social comment, would not constitute a 'controlled environment.' "

3. The Court of Appeals Solution.

The Court of Appeals, on the other hand, decided the case on a much narrower "obscenity" grounds. Since the attack was being made on the constitutionality of the University of Missouri obscenity rule *as applied* to Miss Papish's distribution of her publication, the Court of Appeals refused to rule on the application of the rule beyond the factual situation and circumstances being reviewed in the lawsuit, *U.S. v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524, 529 (Feb. 29, 1960), in holding that under the facts presented, Papish had no right to sell or distribute such a publication on the "open campus," where the University administrators had found the same to be against the conventions of decency in the use and display of language on a University campus. The Court refused to consider whether she could be denied a constitutional right to sell the paper elsewhere

on the campus, such as at the bookstore, since it had been stipulated that the University had granted that permission. *See Papish v. Bd. of Curators*, 464 F.2d 136 at 145, where the Court of Appeals states:

"We express no view as to whether the Free Press Underground contained materials which can be adjudged obscene *per se* under contemporary legal standards. . . ."

and 464 F.2d 136 at 144:

"Nor does the record evidence reveal that she unsuccessfully sought permission to sell her publication in the University bookstore. What the record does reflect is an application[19] of the rule to discipline Miss Papish for the manner in which she sought to exercise her rights. . . ."

19. Indeed, the parties have stipulated that the University had granted permission to the Free Press Underground to sell its publication on campus. That being so, there is little basis upon which to conclude that the University would entirely close the door to campus distribution . . . ."

B. The University of Missouri obscenity rule is constitutional on its face.

Susan Papish was charged by the University of Missouri with a violation of the University of Missouri obscenity rule:

". . . violating on, or about February 18 and 19, at Columbia, Missouri, the General Standard of Student Conduct as set forth in Article V, Section A and B of the By-Laws of the Board of Curators by failing to conduct yourself in a manner compatible with the University's functions and missions as an educational institution, in the following particulars:

"That while you were on a status of disciplinary

probation you distributed or aided in the distribution of the Volume IV, No. 3, February 1969 edition of the Free Press Underground containing forms of indecent speech on the campus of the University of Missouri - Columbia, *with knowledge of the contents of the publication, and with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent, and distribution thereof improper on the University campus under existing rules and regulations.*" (our emphasis).

(1) The word "indecent" as used in the rule and applied in this case, provides a reasonably ascertainable standard of guilt.

As pointed out by the District Court at page 1320, the words "indecent" and "obscene" are interchangeable:

> "First, it should be noted that the words 'indecent' and 'obscene' are frequently used to express the same meaning, 50 Am. Jr. 2d, Lewdness, Indecency and Obscenity, § 2, pp. 451-452; 20 A Words and Phrases, pp. 520-524. In this case there was evidence of offensive aggressive actions to press this offensive, indecent, vulgar publication on a captive audience, including persons under 18 years of age, in a hallowed place . . . ."

Chief Judge Becker's opinion could have cited a more impressive authority – the express holding of this Court in *Roth-Alberts*, 354 U.S. 476, 1 L.Ed.2d 1498, 1510, 1511, 77S.Ct. 1304 (June 24, 1957) that "indecent" and "obscene" were legal synonyms which, when applied according to the proper standard for judging obscenity, gave adequate warning:

> "It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due pro-

cess. Winters v. New York, 333 U.S. 507, 92 L ed 840, 68 S Ct 665. The Federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy . . .or other *publication of an indecent character.* The California statute makes punishable, inter alia, the keeping for sale or advertising material that is *'obscene or indecent.'* The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

"Many decisions have recognized that these terms of obscenity statutues are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . The Constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' United States v. Petrillo, 332 U.S. 1, 7, 8, 91 L ed 1877, 1883, 67 S Ct 1538. *These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed* and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id. 332 U.S. at 7. . . .

"In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." (our emphasis).

(2) As Interpreted Herein, the Missouri Obscenity Rule Satisfies the Constitutional Requirements re Mens Rea and Burden of Proof.

The Missouri obscenity rule presents none of the "scienter" problems presented by the Los Angeles Ordinance in *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed.2d 205. Nor does it involve questions regarding the state of the "mens rea" requirement which stalemated this Court in *Redrup v. New York*, 386 U.S. 767.[16] Whether the campus rule might be applied and penalties inflicted thereunder utilizing a lesser means rea and burden of proof than would be acceptable to this Court, is not an issue in as much as the charge laid against Miss Papish pleads actual subjective knowledge and wilful misconduct. See page 19 and that portion of the charge reading:

". . . with knowledge of the contents of the publication *and with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent . . . ." (Our emphasis.)*

Compare *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688. Further, as the facts noted in III C, *infra*, above clearly point out, the burden of proof to satisfy the wilful misconduct alleged is clearly established.

C. *The Record Which This Court Failed to Examine, Reflects That the University of Missouri Obscenity Rule Was Applied in a Constitutional Manner to Miss Papish's Conduct on the Open Missouri Campus.*

The trial court record reveals that Miss Papish was charged with employing obscenity on the Missouri campus in 1967,

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[16] For an analysis of the stalemate reached as to the state of the "mens rea" requirement, see Brief Amicus Curiae of Charles H. Keating, Jr. in *Grove Press, Inc. v. Flask*, Oct. Term 1970, No. 360, at pages 112-123.

tried by a self-governing body of fact finders, and found guilty of the charge. (See pages 14 - 16). On February 11, 1969, while on probation from that sentence, she again engaged in the same obscenity in the same area of the campus, for which she was, on the following day, served a written warning by the Dean of Students. (See pages 16 - 18) Notwithstanding the former notices that such conduct was in violation of the University Standards of Conduct, she again, one week later, repeated the same identical conduct for which she was again charged and found guilty, after a proper hearing on notice, by the same independent, selfgoverning body of fact finders. (See pages 18 - 19)

There is evidence in the record (Plaintiffs 1) that the obscene term "motherfucker", whiich was used by Miss Papish on all three occasions was an obscene term of derision which was employed by the SDS and was recognized on the campus as a libel by innuendo on the school administration. (See pages 36 - 37) Further, the factual issue raised by Miss Papish, as an affirmative defense, that the use by her was solely in a journalistic sense, was controverted by the testimony of Dean of Students Matthews, who saw no connection between the bold headline and the accompanying story. (See page 18.)

D. *This Court Should Adopt the Rule of Law Laid Down by the English Courts in R. v. Anderson et al. That "Where One Has an Article Such as This Comprising a Number of Distinct Items, the Proper View of Obscenity . . . is to Apply the Test to the Individual Items in Question. It is Equally Clear That if, When so Applied the Test Shows One Item to be Obscene That is Enough to Make the Whole Article Obscene. ."*

If the six justices of this Court who subscribed their names to this opinion, which holds as it does that "neither the political cartoon nor the headline story involved in this

case can be labeled as constitutionally obscene or otherwise unprotected" did so with full knowledge of the factual account recited herein at Point III C, *supra* (see page 47 et seq.) then, "God Help This Nation!" for surely this Court has gone too far.[17] If such a situation exists, then it is time for the Legislature and others to move to correct what is

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[17]Counsel for Amicus recognizes the importance of submitting ones self to lawful authority within the judicial system, having been well schooled in that general principle during undergraduate training at the U.S. Naval Academy over 30 years ago. Indelibly committed to memory is the colorful advice of Lt. Wilson offered during one of the final year's leadership classes that "If the captain of the destroyer gives you an order, as First Lieutenant, to paint the smoke stack pink,---paint it pink."At the same time, however, a practical limitation on that general rule was learned during World War 2 submarine service from a reported account in the patrol report of a sister ship in the squadron, which involved the medical locker on board that submarine. Traditionally, the key to the medical locker of U.S. submarines, which was stocked with several fifths of whiskey for emergency use, was in the possession of the commanding officer. The report to the Commander-in-Chief of Submarines for the Pacific Fleet recounted the Executive Officer's (second in command) having gone to the bridge one morning to find the Commanding Officer in an inebriated condition and interfering with the routine predawn dive which had been scheduled to commence the submerged daylight patrol. Although the foundations of the submarine service were shaken for a while as the pros and cons were debated as to what the true facts were, and the correctness of the Executive Officer's actions in taking the keys to the medical locker away from the commanding officer, it has always seemed to the undersigned, judging from the past performances of the persons involved, that the second officer acted properly. Thirty years later, the undersigned having observed the past ten years of this Court's destructive interference with the attempts of state law enforcement and state courts to maintain high public morality thru the regulation of obscenity, culminating in this Court's recent unreasonable interference in breach of the peace and disorderly conduct matters, in *Cohen, Wilson, Kois, Rosenfeld, Lewis, Brown* and finally here in *Papish*, is forced to make the observation to this Court that, in his opinion, a majority of this Court, is unlawfully at the liquor locker, and it is time to let the state courts, take over the policing of such matters. See Justice Harlan's concurring opinion in *Alberts v. California* 354 U.S.476 at 501.

certainly a flagrant abuse of raw power.

Amicus would sound a warning for this Court that it has not scratched the surface of this problem. In *Kois, supra,* and in *Papish,* the Court has set into motion opposing forces which it cannot possibly contain under the rationale of those cases. Kois' "Kaleidoscope" and Papish's "Free Press" are the advance guard to the "Screw" variety viewed by this Court in *Milky Way Feed Co., Inc. v. Leary,* affirmed on the merits in 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 812 (Feb. 27, 1970) and presently before this Court in *Mohney v. Indiana,* No. 71-1347, petition for certiorari filed April 19, 1972. This more modern type of underground newspaper, and a host of others equally as bad, now appear in the street corner vending machines and on the Nation's campuses, thru the courtesy of this Court.[18] Amicus submits that the carte blanche offer expressed in *Kois* and *Papish* to the publishers of "Screw" and other equally perverted magazines, is an unreasonable exercise of judicial power which, when coupled with the turmoil which those decisions has unleashed on the university campuses and elsewhere, is certain to invoke counter movements demanding political and judicial checks of the order discussed by the Murphy and Pritchett text "Courts, Judges and Politics" at pp. 547-562.

Because the English solution in *R. v. Anderson et al.* is so at odds with the values expressed by this Court in *Papish,* and because Count 3 of *Anderson,* dealing with "obscene or indecent" matter is so akin to the underlying problem of "indecent conduct or speech" in *Papish,* and this Court's

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[18]As a representative example, see the San Diego Union News item of Apr. 3, 1973, involving a high school campus, and the Costa Mesa Daily Pilot News Report of Mar. 26, 1973, involving a small community of less than 40,000, reproduced herein at Appendix B, pp. 2,3.

specific holding on "indecent or obscene" in *Roth-Alberts*, 354 U.S. 476, at 491, 492, 1 L. Ed.2d 1498, 1510, 1511, 77 S. Ct. 1304 (June 24, 1957), (see pp. 45, *supra.*) the opinion in *R. v. Anderson et al.* is reproduced herein in full at Appendix A for this Court's convenience of reference and consideration for adoption.

If this Court will but for a moment reflect on the underground newspaper and its inherent problems, and project those issues into the foreseeable future, it must see that there is only one path for this Court to take and that is in the direction of *R. v. Anderson, supra*, and the rule of law laid down by the English Court at page 1158:

> "It is in our view quite clear from s 1 that where one has an article such as this comprising a number of distinct items, the proper view of obscenity under s 1 is to apply the test to the individual items in question. It is equally clear that if, when so applied, the test shows one item to be obscene that is enough to make the whole article obscene. Now that may seem unfair at first reading but it is the law in our judgment without any question. A novelist who writes a complete novel and who cannot cut out particular passages without destroying the theme of the novel, is entitled to have his work judged as a whole, but a magazine publisher who has a far wider descretion as to what he will, and will not, insert by way of items is to be judged under the 1959 Act on what we call the "item by item" basis. This was not done in this case. Our main concern in mentioning the point now is to ensure that it will be done in future. To consider the article as a whole did no harm to the defence in the present case, but the proper course to be taken in future is the item by item approach for magazines and other articles comprising a number of distinct items."

If the members of this Court are concerned with the plight of Miss Papish, then surely it, like the English Court in *Anderson*, has the necessary legal tools for preventing her from becoming a sacrificial lamb in the establishment of a new obscenity rule which applies an item by item approach for magazines. Amicus submits that such a rule is not without precedent in the federal court system. See *Flying Eagle Publications Inc. v. U.S.* 285F2 307, 308 (January 10, 1961).

IV.

TO RULE ON THE MERITS OF THE CASE WITHOUT EXAMINING THE ENTIRE RECORD IN THE COURT BELOW WOULD BE A DENIAL OF DUE PROCESS OF LAW.

Since the entire record was not before this Court, the Court lacked jurisdiction to rule on the merits. Rule 21(1) of the U.S. Supreme Court provides in part:

> "The entire record in the Court to which certiorari is addressed *shall be filed unless the parties agree that specified parts may be omitted* as unnecessary for the determination of the petition or of the writ, if it is granted."

Respondents herein *did not* enter into such an agreement. That the case was not properly before this Court is born out by Rule 21(2) which provides that:

> "Upon filing of the petition *and the certified transcript of record required by the preceding paragraph,* counsel for the petitioner shall enter his appearance and pay the docket fee." (our emphasis)

See also Supreme Court Practice, by Stern and Gressman, Fourth Edition, p 269 et seq:

> "Since the entire record is to be transmitted to the Supreme Court at the time of petitioning for

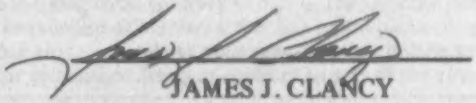
certiorari, unless the parties agree to the omission of certain items, designation of items to be included in the record is no longer a limiting factor upon what the Court can consider. In the past a serious problem occasionally presented itself because of the absence from the record certified to the Supreme Court of important items in the record below. That problem should now arise even less frequently since counsel is not likely to stipulate to the omission of material upon which he will later rely should review of his case be granted. But if he finds that he did originally agree to omit too much or if the clerk below fails to transmit parts of the record, he can subsequently request that clerk to transmit the omitted matter. See Sec. 6.17, infra.

The necessity for this Courts examining the certified record before ruling on the merits is reinforced by Rule 25 which states that upon the granting of the petition, "the clerk shall enter an order to that effect . . .*The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. . .*" (our emphasis).

CONCLUSION

This case should be ordered restored to the docket for reconsideration by way of briefing and further argument on the questions presented herein. In the alternate, the petition should be dismissed as being improvidently granted.

Respectfully submitted,



JAMES J. CLANCY
Counsel for Amicus Curiae

Appendix A

Opinion of Court of Appeal,
Criminal Division (Lord Widgery,
C. J. James and Bridge, J. J.) in
R. V. Anderson 3 All E.R. 1152
November 3, 4, 5, 1971 55-65

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ed that in the circumstances the court would grant leave to appeal against sentence a
would treat the hearing of the application as the hearing of the appeal.]

eal allowed, but sentence in its totality to stand.

itors: *Registrar of Criminal Appeals* (for the appellant); *A J Olson*, Durham (for the wn). b

N P Metcalfe Esq Barrister.

R v Anderson and others

c

RT OF APPEAL, CRIMINAL DIVISION
D WIDGERY CJ, JAMES AND BRIDGE JJ
4th, 5th NOVEMBER 1971

minal law – Obscene publications – Test of obscenity – Magazine containing distinct s – Items to be considered separately – Obscenity of single item sufficient to render whole lication obscene – Obscene Publications Act 1959, s 1 (1). d

minal law – Obscene publications – Evidence – Issue of obscenity – Expert evidence – sion evidence of experts whether article tends to deprave or corrupt inadmissible – Expert ence admissible only on issue whether, although obscene, publication justified as being for ublic good – Question of obscenity exclusively for jury – Obscene Publications Act 1959, (1), 4. e

minal law – Obscene publications – Test of obscenity – Meaning of obscene – Tendency eprave and corrupt – Meaning not extending to include items which are namely 'repul-', 'filthy', 'loathsome' or 'lewd' – Aversion defence – Open to defendant to show that le so unpleasant or lewd that likely to cause people to revolt from activities described – lication having opposite effect to tendency to deprave or corrupt – Obscene Publications 1959, s 1 (1). f

minal law – Obscene publications – Indecent or obscene – Sending postal packet enclosing cent or obscene article – Meaning of obscene – Meaning including items which are shocking wd – Unnecessary to prove tendency to deprave or corrupt – Post Office Act 1953, s 11. g

Individual appellants were the editors and the appellant company the publishers magazine entitled 'Oz No 28 School Kids Issue'. They were all charged on five nts of an indictment with (1) conspiracy to corrupt public morals, in that they conspired with certain other persons to produce a magazine containing obscene matter with intent to corrupt the morals of children and young persons; (2) pub- h ng an obscene article (i e the magazine) contrary to s 2[a] of the Obscene Publica- s Act 1959; (3) enclosing an indecent or obscene article in a postal packet contrary 11[b] of the Post Office Act 1953; (4) and (5) possessing certain obscene articles copies of the magazine) for publication for gain contrary to s 2[a] of the 1959 Act.

ection 2 (1), so far as material, provides: '... any person who, whether for gain or not ublishes an obscene article or who has an obscene article for publication for gain j whether of gain to himself or gain to another) shall be liable ... (*b*) on conviction o i ndictment to a fine or to imprisonment for a term not exceeding three years or both ...'
ection 11, so far as material, provides: '(1) ... person shall not send ... a postal packet hich ... (*b*) encloses ... any indecent or obscene article ... (2) If any person acts in ontravention of the foregoing subsection, he shall be liable on ... conviction on indict- ent to imprisonment for a term not exceeding twelve months.'

The issue of the magazine in question consisted of 48 pages of diverse matter. It contained a great many serious and wholly innocuous articles dealing with such topics as school affairs and the education system as well as a number of charming and humorous illustrations. In addition there were several articles on the taking of drugs, many of which could be said to discourage the practice and to indicate its dangers. The magazine also contained, however, articles, illustrations and advertisements which had a very pronounced and overt sexual theme, relating to such matters as lesbianism, homosexuality and oral sexual intercourse from the female point of view. There was no suggestion anywhere in the magazine that these activities were wrong. At the trial the prosecution and the judge accepted the proposition that, in deciding whether the offences under the 1959 Act had been made out, the jury should look at the magazine as a whole and not at the individual items in isolation. One of the arguments (the 'aversion argument') on the charges under the 1959 Act put forward in support of the defence that the material in the magazine was not likely to deprave or corrupt within the meaning of s 1 (1)[c] of the 1959 Act was that many of the illustrations were so grossly lewd and unpleasant that they would tend to cause people to revolt from activities of the kind depicted. In support of their argument the defence adduced evidence of a highly qualified psychologist who had adopted techniques based on a similar approach for therapeutic purposes in mental hospitals and who stated that such an approach was effective in treating both sick and healthy minds. The trial lasted 27 working days, 20 of which were spent hearing expert evidence, much of which bore no relation to the defence of public good under s 4[d] of the 1959 Act, but was directed to showing that the article was not obscene, i e to showing that, in the opinion of the witness, it did not tend to deprave or corrupt. In his direction to the jury the judge read the definition of obscenity in s 1 of the 1959 Act and went on to state that something which was obscene was something which was not fit to be shown to the public and that the jury might think 'it has retained in our language and in this Act of Parliament basically that meaning ever since'. He further stated that the word '"obscene" in the dictionary sense is "repulsive", "filthy", "loathsome" or "lewd". In considering it in its legal sense in each of these five charges ... that is the approach to it which I wish you to adopt ...' Furthermore the judge did not put over to the jury the aversion argument advanced by the defence, his only reference to it being to indicate to the jury incorrectly, that in his evidence the psychologist had only been speaking of aversion as applied to the sick mind. The appellants were all acquitted on the conspiracy count, but convicted on the other counts, the jury specifically finding in relation to the charge under the 1953 Act that the posted article was both indecent and obscene. On appeal,

Held – (i) The proposition accepted by the judge that in deciding whether the offences under the 1959 Act had been made out the jury should consider the magazine as a whole and not look at individual items in isolation was entirely wrong; it was clear from s 1 of the 1959 Act that where, as in the present case, the article comprised a number of distinct items, the proper view of obscenity under that section was to apply the test to the individual items in question; if the test when so applied showed that one item was obscene that was enough to make the whole article obscene; the course adopted in the present case had, however, done no harm to the defence (see p 1158 g and j, post).

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c Section 1 (1) is set out at p 1158 d, post

d Section 4, so far as material, provides: (1) A person shall not be convicted of an offence against section two of this Act ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. (2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or negative the said ground.'

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he admission of expert evidence on the issue whether or not the article was e was wrong; the question of obscenity was entirely one for the jury; expert ce was only admissible on the issue whether, if the article was found to be e, its publication was justified as being for the public good on the grounds d in s 4 of the 1959 Act; the admission of expert evidence on the obscenity the present case had, however, done the defence no harm (see 1159 a, c, d and f *R v Calder and Boyars Ltd* [1968] 3 All ER 644 applied; *Director of Public tions v A and BC Chewing Gum Ltd* [1967] 2 All ER 504 distinguished.

Nevertheless, the conviction on the counts under the 1959 Act should be quashed e there had been a serious misdirection on the law which on its face rendered y's verdict unsafe; there was a grave danger that the relevant passages from the direction to the jury had led them to believe that the word 'obscene', for the es of the 1959 Act, included in its meaning 'repulsive', 'filthy', 'loathsome' or ; furthermore the judge's direction had not properly put to the jury the e's aversion argument; those two matters together formed a very substantial rious misdirection (see p 1160 d and j, p 1161 h and p 1162 b, post).

The conviction under s 11 of the 1953 Act would, however, be upheld; in ction the word 'obscene' in its context as an alternative to 'indecent' had inary meaning which included things which were shocking or lewd; since fence was constituted if the relevant material was 'indecent or obscene' and, wer to a specific question, the jury had stated that the magazine was both, were no grounds on which it could be maintained that the jury had been ection in relation to that charge (see p 1158 c and p 1162 c and d, post).

t of obscenity, see 10 Halsbury's Laws (3rd Edn) 667, para 1275, and for cases subject, see 15 Digest (Repl) 895, 8625-8631.

the Post Office Act 1953, s 11, see 25 Halsbury's Statutes (3rd Edn) 418.

the Obscene Publications Act 1959, ss 1, 2 and 4, see 8 Halsbury's Statutes dn) 479, 480, 485.

referred to in judgment

r of Public Prosecutions v A and BC Chewing Gum Ltd [1967] 2 All ER 504, [1968] 159, [1967] 3 WLR 493, 131 JP 373, Digest (Cont Vol C) 250, 8654*ba*.

lder and Boyars Ltd [1968] 3 All ER 644, [1969] 1 QB 151, [1968] 3 WLR 974, 133 , 52 Cr App Rep 706, Digest (Cont Vol C) 249, 8631*ba*.

and authority also cited

Publications Ltd v Watson [1952] 1 All ER 1256.

klin (1868) LR 3 QB 360.

ertin Secker Warburg Ltd [1954] 2 All ER 683, [1954] 1 WLR 1138.

ugain Books Ltd [1961] Crim LR 176

ald's Criminal Pleading, Evidence and Practice (37th Edn) paras 3838, 3840, , 3844.

le

nd June 1971 at the Central Criminal Court (Judge Argyle) the appellants, Anderson, Richard Clive Neville and Felix Dennis, as editors, and Oz Publica- nk Ltd, as publishers, were all charged on five counts of an indictment as : (1) conspiracy to corrupt public morals in that they conspired together with Berger and other young persons to produce a magazine, 'Oz No 28 School sue', with intent thereby to 'debauch and corrupt the morals of children and persons'; (2) publishing an obscene article, i e the magazine, contrary to s 2 of scene Publications Act 1959; (3) sending indecent or obscene articles by post con- s 11 of the Post Office Act 1953; (4) having obscene articles for publication for

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gain, i e 252 copies of the magazine, contrary to s 2 of the 1959 Act, and (5) having obscene articles for publication for gain, i e 220 copies of the magazine, contrary to s of the 1959 Act. The jury acquitted the appellants on count 1, but convicted them (by majority of 10 to 1) on the remaining four counts. On 5th August 1971 the appellants Anderson, Neville and Dennis were sentenced to concurrent terms of imprisonment as follows: the appellant Anderson, 12 months on count 2, six months on count 3, 12 months on count 4 and 12 months on count 5; the appellant, Neville, 15 months on count 2, six months on count 3, 15 months on count 4 and 15 months on count 5. The appellant Dennis to nine months on count 2, six months on count 3, nine months each on counts 4 and 5. The appellant company was sentenced to fines of £100 each on counts 2, 4 and 5 and £100 on count 3, and it was also ordered to pay a quarter of the costs of the prosecution to an amount not exceeding £1,250. The appellant Neville, being Australian born, was recommended for deportation. The appellants appealed against both their convictions and sentences. The main grounds of appeal were that the trial judge had, on counts 2, 4 and 5, misdirected the jury as to the meaning of 'obscenity' under the Obscene Publications Act 1959 in that he did not make it clear to the jury that for the purposes of that Act 'obscene' meant only a tendency to deprave or corrupt, and that he did not put to the jury the defence that the illustrations in the magazine were so grossly lewd and unpleasant that they had an aversive effect and, far from tempting those who had not experienced the acts to take part in them, they would put off those who might be tempted so to conduct themselves. All the appellants appealed against their sentences on the grounds that the terms of imprisonment and fines imposed respectively were excessive. The appellant Neville also appealed against the recommendation of deportation. The facts are set out in the judgment of the court.

J C Mortimer QC and *J J Walker-Smith* for the appellants.
B L Leary and *R D Amlot* for the Crown.

LORD WIDGERY CJ delivered the judgment of the court. These three individual appellants (as they now are) and the appellant company, Oz Publications Ink Ltd, were convicted at the Central Criminal Court at the end of July 1971 after a lengthy trial occupying no less than 27 working days. The indictment contained five counts. In the first the four appellants were charged with conspiracy to corrupt public morals, the particulars being that—

> 'on divers days between the 1st day of January and the 8th day of June 1970 [I only quote the relevant words] they conspired together with Vivien Laurence Berger and with certain other young persons to produce a magazine containing divers obscene, lewd, indecent and sexually perverted articles, cartoons, drawings and illustrations with intent thereby to debauch and corrupt the morals of children and young persons within the Realm.'

On that count all four appellants were acquitted. It is quite obvious from the verdicts of the jury on the other counts that they were acquitted because the jury were not satisfied that there was the charged intent to corrupt public morals. Of the remaining counts, count 2 was laid under s 2 of the Obscene Publications Act 1959 and charged the four appellants that—

> 'on a day between the 1st day of May and the 8th day of June 1970 . . . they published an obscene article namely a magazine entitled "OZ No. 28 School Kids Issue".'

And indeed it is the publication known as Oz No 28 School Kids Issue which is the central theme of the proceedings with which we are now concerned. On that count they were all convicted. The appellant Neville was sentenced to 15 months' imprisonment, the appellant Anderson to 12, the appellant Dennis to nine and the appellant company was fined £300. Then on count 3 it was charged under the Post Office A

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, that all four of them on a day there specified 'sent a postal packet which en- a
ed a number of indecent or obscene articles namely magazines entitled "OZ No.
chool Kids Issue".' That count has been referred to as 'the Post Office Act count'.
nt 4, again against all four appellants, alleged that they had certain obscene arti-
in their possession for publication for gain. The articles were copies of the same
azine to which I have referred. On that count all were convicted. The same
ous sentences were imposed, to be concurrent, and again the appellant company
fined £300. The fifth count was similar to the fourth. It again was laid under s 2 b
the Obscene Publications Act 1959, and it again alleged that they had certain
ene articles in their possession for publication for gain, the articles again being
No 28. They appeal today, by leave of the court, against conviction and sentence.
This is a case which has aroused enormous interest amongst the public and no doubt
decision of the court today will also excite a certain amount of interest and com-
nt. It is therefore perhaps worthwhile briefly to remind oneself of the functions c
judge, jury and of this court, in cases of this kind. At the Central Criminal Court
only issue, up to the moment of conviction, was whether that jury as then con-
uted would find this publication obscene within the meaning of the various
ions. Whatever the decision of the jury in the court below, it could have no bind-
effect on other juries on other occasions in relation to other publications, and the
ception, somewhat widely held, that this case was a great milestone in that respect, d
a false understanding. It was not a case which would in itself create an authority
the future at all. The function of this court is also worth explaining. It is not here
consider whether the jury was right or wrong, nor to consider whether the pub-
ion was obscene or not obscene—that is a decision for the jury and the jury only.
e function of this court is to review the proceedings below with the assistance of
sel to see if the proceedings were properly conducted, and if not to see whether e
y irregularities which arose in the course of the proceedings were sufficient to
der the finding of the jury unsafe or unsatisfactory.
I stress that because it is important for people to realise that we in this court are not
e to clear Oz or to condemn Oz. Our own opinion in regard to the character of
e subject-matter is totally unimportant. We are here simply to review what hap- f
ned below and see whether there were such irregularities as to justify the convictions
ing quashed. If we come to the conclusion that there were such irregularities, then
e quash the convictions and since there is no machinery in English law for re-trial
such circumstances, the matter rests in that somewhat inconclusive state.
Now to turn to Oz itself, it is, as its title proclaims, the 28th edition in the series.
's a magazine of some 48 pages. It is printed in bright and attractive colours, and it g
ntains what one might fairly describe as a very considerable assortment of items.
one can pass a judgment on Oz without reading it; nobody can successfully do
hat I am now going to attempt to do, namely to give some idea to those who have
t read it, of what it contains, but it is important, as I say, in view of the public
erest in this case, that people should have some idea of what the magazine really
ntains.
There are in it a number of perfectly serious articles. Its origin is not without h
erest. The editors apparently on this occasion decided to recruit the assistance of a
mber of children of school age to assist them in compiling the magazine. It may
e that originally the idea was that the children should do it all, but it is evident
om the evidence that they did not do it all and that some contributions at any rate
the magazine came from the editors themselves, the three appellants. The idea, j
we are told, and the reason for doing it this way, was to enable children of school
e to express their view and to see the sort of magazine which they would make,
nd so it came out and is called the School Kids issue. There was a suggestion
low that it was intended for consumption only by 'school kids' but that, as far as
e can see, was not made out, and the intention no doubt was that it would enjoy
normal circulation of some 10 000 or 40 000 copies

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a As I have said, it includes a great many serious and wholly innocuous articles. It deals with school affairs, the system of education in this country, the system of corporal punishment in schools and a whole host of topics of that sort. It has a number of articles concerned with the taking of drugs, and it is perfectly fair to say, as has been said, that in form at any rate many of these articles discouraged the taking of drugs and indicate the danger of taking drugs. On the other hand, and according to the point of view which one adopts, some of the articles are said to have the reverse b effect and to encourage the taking of drugs. That kind of distinction was the distinction which the jury in the court below had to direct their minds to, and it is not for us to comment on it further.

In addition to these articles, there are a great many illustrations, some of them charming and humorous, which would not cause the slightest flutter in any well conducted Victorian household. Others, however, are quite different. There is a c good deal of material which one gathers is culled from what are called American comics and there are many illustrations which have a very pronounced and overt sexual theme. I do not want to be unfair to the publication by stressing unduly those items in it which attracted the principal attention in this case, but again one cannot give a fair appreciation of what the magazine looks like without looking at some of d the less attractive features. On p 28 there is an advertisement for what seems to be a magazine, a magazine called Suck. It is an advertisement occupying some 30 or 40 lines of print. It is a salaciously written account of the joys from the female aspect of an act of oral sexual intercourse. It deals with the matter in great detail. It emphasises the pleasures which the writer says are to be found in this activity, and there is in it no suggestion anywhere which would imply that this was a wrong thing to do e or in any way induce people not to do it. The importance of that last observation is that there could be nothing here as far as we could see on which an argument that this was aversive, as tending to induce people *not* to conduct the activity described, could be founded. There are a great many pictures of people in, or apparently in, the act of sexual intercourse. Some of them are extremely artistic; some of them are crude to a degree. There is a comic strip in the middle of the magazine, again no f doubt from American sources, which shows a number of children dressed in school clothes indulging in a number of sexual activities including at the end a very crude drawing of a girl in the act of oral sexual intercourse. Shocking, undoubtedly; whether it was obscene was of course, as I have endeavoured to explain, a matter for the jury.

Then we have the back cover itself, which shows some five nude women. It is g extremely attractively drawn, and at first inspection, as one of the witnesses said, it appears to be a simple piece of artistic work. Closer inspection however shows that these women are lesbians or at least are indulging in lesbian activities. One of them has what appears to be a rat's tail protruding from her vagina. In another case a woman is wearing strapped to her thighs an artificial penis or dildo, as apparently it is called, and other pairs are indulging in what are clearly lesbian activities. Attention h has not unnaturally been drawn to that as an example of material in this magazine which might deprave or corrupt.

Then—and I am not going to try and review the magazine as a whole—in addition to that, there is a page of what have been called small advertisements, apparently genuine advertisements and not advertisements concocted for the purpose of the magazine, in which various people advertise for co-operation in sexual activities of a j somewhat devious kind. For example, one advertisement is headed:

> "Voyeurs . . . Homosexuals, Lesbians, Heterosexuals, All Erotic Minorities . . . Join Contact Club International [and then an address is given]. Membership £2 only. 100% Confidential. Free Fucking, Sucking, Hardcore Pornos

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one example of advertisements which are advertised here. Another says: a
e male models wanted'; another says: 'Guy requires turned on chick for tem-
narriage', and so it goes on. There is a page of advertisements there which on
r certainly could be regarded as tending to corrupt or deprave as tending to
nd propagate these kinds of activity.
e trial, which as I have said lasted some 27 days, these five counts were before
, and it is important to note at the outset that although the word 'obscene' b
in each of the counts its meaning in its context is not necessarily the same in
rance, and it is this difference in meaning which has given rise to the diffi-
which we have had to investigate in this court. So far as the Post Office Act
concerned, there is no doubt in our judgment but that 'obscene' in its context
ernative to indecent has its ordinary or as it is sometimes called dictionary
g. It includes things which are shocking, lewd, indecent and so on. On the c
nd, in the Obscene Publications Act 1959, there is a specific test of obscenity
harges under that Act it is this test and this test alone which is to be applied,
in this form. Section 1 of the Act provides:

1) For the purposes of this Act an article shall be deemed to be obscene if its
cts or (where the article comprises two or more distinct items) the effect of
one of its items is, if taken as a whole, such as to tend to deprave and corrupt d
ons who are likely, having regard to all relevant circumstances, to read, see
ear the matter contained or embodied in it.
2) In this Act "article" means any description of article containing or embody-
matter to be read or looked at or both, any sound record, and any film or
r record of a picture or pictures.'

e observed that in the first subsection of that section, the test of obscenity for e
purposes is a tendency to deprave and corrupt and nothing else will do, so
arges under the 1959 Act are concerned.
e trial, the Crown accepted the proposition that in deciding whether the
under the 1959 Act had been made out, it was right for the jury to consider
gazine as a whole and not to look at individual items in isolation. That was a f
ion accepted by the Crown, we are told by counsel for the Crown, largely in
to the defence, and, being accepted by both parties, it was a proposition which
epted by the judge as well. It certainly did the defence no harm; it was
o their interests; but in the judgment of this court it was entirely wrong.
ur view quite clear from s 1 that where one has an article such as this com-
number of distinct items, the proper view of obscenity under s 1 is to apply
to the individual items in question. It is equally clear that if, when so applied, g
shows one item to be obscene that is enough to make the whole article
Now that may seem unfair at first reading, but it is the law in our judgment
any question. A novelist who writes a complete novel and who cannot cut
icular passages without destroying the theme of the novel, is entitled to have
judged as a whole, but a magazine publisher who has a far wider discretion h
at he will, and will not, insert by way of items is to be judged under the 1959
what we call the 'item by item' basis. This was not done in this case. Our
ncern in mentioning the point now is to ensure that it will be done in future.
ider the article as a whole did no harm to the defence in the present case.
proper course to be taken in future is the item by item approach for
es and other articles comprising a number of distinct items.
econd matter which arose in the court below, and which requires some general j
nts by this court, relates to the expert evidence which was called. The defence
xpert evidence for something more than 20 days. A great mass of expert
e was called. Part of that evidence was directed to what is called the 'public
efence contained in s 4 of the 1959 Act. I need not read the section in full but
t section a defence can be put forward in respect of an obscene article that

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its publication is desirable in the public good, and the section specifically provides that the opinion of experts as to the literary, artistic, scientific or other merit of such an article may be admitted. What is contemplated there is that if an article is found to be obscene, evidence of experts as to its merits under those heads may be called and it is then for the jury to balance the merit and demerit of the article and conclude whether they find it acceptable or not. So far as evidence was called under that section, no question arises on it now, but a majority of the expert evidence called by the defence in this case bore no relation to the defence of public good under s 4, but was rather directed to showing that the article was not obscene. In other words, it was directed to showing that in the opinion of the witness it would not tend to deprave or corrupt. Now whether the article is obscene or not is a question exclusively in the hands of the jury, and it was decided in this court in *R v Calder and Boyars Ltd*[1] that expert evidence should not be admitted on the issue of obscene or no. It is perfectly true that there was an earlier Divisional Court case in which a somewhat different view had been taken. It was the case of *Director of Public Prosecutions v A and BC Chewing Gum Ltd*[2]. That case in our judgment should be regarded as highly exceptional and confined to its own circumstances, namely a case where the alleged obscene matter was directed at very young children, and was itself of a somewhat unusual kind. In the ordinary run of the mill cases in the future the issue 'obscene or no' must be tried by the jury without the assistance of expert evidence on that issue, and we draw attention to the failure to observe that rule in this case in order that that failure may not occur again. We are not oblivious of the fact that some people, perhaps many people, will think a jury, unassisted by experts, a very unsatisfactory tribunal to decide such a matter. Those who feel like that must campaign elsewhere for a change of the law. We can only deal with the law as it stands, and that is how it stands on this point.

I should add, as some justification for the course which was taken below, that it may be that the calling of expert evidence was related to the first count of conspiracy on which the jury acquitted. We are not convinced that that was so, but we need not pursue it further. In ordinary cases under s 2 of the 1959 Act expert evidence on the issue obscene or not is not to be admitted. Now here it was admitted and again it did the defence no harm. They called the evidence and, insofar as there was any irregularity there, it was favourable to the defence and not to the prosecution.

I turn now to the criticisms which have been made by counsel for the appellants of the directions given by the learned judge in this case. The first two, which to a very large extent are complementary, are really the ones on which this appeal against conviction is based. It is said that in directing the jury as to the meaning of 'obscenity' under the 1959 Act, the learned judge did not make it clear that for the purpose of that Act 'obscene' means, and means only, a tendency to deprave or corrupt. He dealt with the meaning of obscenity in more than one place, and it is to be remembered that in the context of this case he had to deal with the meaning of 'obscenity' for the purposes of the different charges. Dealing with the charges under the 1959 Act he said:

> 'So you see in s 1 it starts off with the definition or the test for obscenity, which is the law of this country at the present time. " . . . an article"—well, this Oz 28 is an article—"shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave or corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." [If I may interpolate, so far so good. He then goes on:] Now, that is the test of obscenity. I must give you a little more help about the meaning of that—the legal meaning of it. We were told, I think, by Mr. Dunne one of the last witnesses in this trial, that the historical meaning of the word

1 [1963] 3 All ER 644, [1969] 1 QB 151
2 [1967] 2 All ER 504, [1968] 1 QB 159

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"obscene"—and it is of interest and importance in this case—comes originally from the Greek and it refers to things which are not fit, or not right, to be shown on the stage at a public performance. Something which is obscene—"ob" means "off" or "outside of"—is something which is not fit to be shown to the public. You may think it has retained in our language and in this Act of Parliament basically that meaning ever since.'

Counsel for the appellants says, and says with some force, that we here have the judge already beginning to widen the true statutory definition of the word 'obscene'. It does not finish there because later on the learned judge returned to the question of the meaning of the word 'obscene'. He said:

'It is for you as a jury, so the law says, to decide whether taken as a whole, this is likely to deprave or corrupt a significant proportion of people who are likely to read it. As I shall mention later on, this may not, in fact, be so difficult or formidable a task for you as might first appear. The word "obscene" in the dictionary sense is "repulsive", "filthy", "loathsome" or "lewd". In considering it in its legal sense in each of these five charges—because it is mentioned in each one—that is the approach to it which I wish you to adopt, please, as I have been explaining to you during the last few minutes.'

We have had a good deal of argument in this court about exactly what those words mean and exactly how the jury would have reacted to them, but we feel bound to accede to counsel for the appellants' argument that at least there is grave danger that the jury from that passage in the direction to them, took the view or might have taken the view, that 'obscene' for all purposes including the purposes of the 1959 Act included 'repulsive', 'filthy', 'loathsome' or 'lewd'.

The matter does not stop there because the defence in this case on the charges under the 1959 Act was in a sense two-pronged. They said this material in Oz No 28 was not likely to deprave or corrupt; that it may shock is accepted, but it is not likely to cause people to act in a depraved or corrupted fashion. One of the arguments advanced in support of that line of defence was that many of the illustrations in Oz were so grossly lewd and unpleasant that they would shock in the first instance and then would tend to repel. In other words, it was said that they had an aversive effect and that far from tempting those who had not experienced the acts to take part in them they would put off those who might be tempted so to conduct themselves. The argument which counsel for the appellants put forward on this point is that the learned trial judge never really got over to the jury this argument of aversion, in other words, never put over to the jury that the proposition central to the defence case was that certain illustrations could be so disgusting and filthy that they would not corrupt and deprave but rather would tend to cause people to revolt from activity of that kind. Strangely enough the same situation arose in the earlier decision in this court to which I referred a few moments ago. *R v Calder and Boyars Ltd*[1] was in fact a then well publicised criminal trial dealing with the book 'Last Exit to Brooklyn'. Counsel for the appellants appeared for the defence, and in this court counsel argued, and this court held rightly argued, that the failure of the learned judge to put what one might call the aversion argument was fatal to the retention of the conviction.

Those two matters put together, in our judgment form a very substantial and serious misdirection, and they are not made any better by the fact that on the one occasion when the judge dealt with the aversion argument in any serious way at all he dealt with it in such a way as to destroy, rather than to explain, its value. It arose in this way. There was a doctor called Dr Heywood, who was the first and perhaps one of the most significant experts called for the defence. He was a highly qualified psychologist. In the course of his work he attended a number of hospitals and was in

[1] [1969] 3 All ER 644, [1969] 1 QB 151

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constant contact with people suffering from various degrees of mental disability. He gave evidence about his experience of this aversion theory. He said in terms on more than one occasion that it was a form of therapy actively practised in mental hospitals but he did go on to say without any doubt at all that in his judgment it was effective not only for the mind of the sick but also for the healthy mind as well. Unfortunately when the judge came to deal with Dr Heywood's evidence he told the jury on more than one occasion that Dr Heywood was only speaking of aversion as applied to the sick mind, whereas in fact, as I have pointed out, the evidence of the doctor went far beyond that and was in fact, if accepted by the jury, evidence of the effect of aversion techniques on the sick mind and the healthy alike.

In addition to those criticisms of the learned judge's attitude to the law, counsel for the appellants has also developed before us a large number of criticisms of the judge's misdirections, as he would put it, on the facts and the evidence. It is not possible to deal in detail with all his objections. The best that the court can do is to give a general impression of them at the end of the day when the argument has been fully deployed. In many instances, the treatment of the evidence of experts was very abbreviated. On many occasions the space attributed to a particular expert in the summing-up is perhaps surprisingly small but it must be remembered that this was an extremely difficult case for the judge to sum up. To deal with the evidence of experts extending over 20 or 25 days from his notebook is a task which no one would envy and it was inevitable in many respects that the reference should be brief. However, there are in a number of cases sentences, asides almost, in the course of the summing-up which tend to denigrate the witness in question. It may be in some instances these asides were justified—it is hard for us to check them all in detail—but they are frequent and give the impression that the judge was biased against experts as a group and was inclined to make little of their evidence whenever he got the chance to do so. In some instances counsel for the appellants' criticisms seem to us at the end of the day not to be justified. He made much of the fact that the judge had spoken of 'these so-called experts' on more than one occasion, but we think having read the summing-up as a whole that the references to 'these so-called experts' were not intended to be a derogatory reference to the highly qualified men who were included amongst the experts but rather was intended to refer to some others who came later in the trial and who might legitimately have justified the title 'so-called experts'.

On the whole, we find comparatively little weight in the criticisms of factual misdirections. There were said originally to be 52, or was it 65, of them. Many of them are errors of such a trivial character that they really deserve no attention at all. Those which we are concerned about are the misdirections amounting to an apparently unfair treatment of an expert witness, but even so when one adds them all together it does not in our judgment amount to a great deal and certainly we should hesitate a long time before setting these convictions aside if that were the only ground urged in favour of it.

In fact at the end of the day we have come to the conclusion that the misdirection on the law, by which I of course mean misdirection in regard to the definition of 'obscenity' and the aversion theory, is a serious misdirection, and one which on its face rendered the verdict of the jury unsafe. We have considered with the assistance of counsel whether this is a case for applying the proviso to s 2 of the Criminal Appeal Act 1968 and saying that the convictions should be upheld on the grounds that no actual miscarriage of justice occurred. The argument in favour of our so acting is that if one looks at this magazine item by item as we have already indicated it should have been looked at, then it is said that certain items, perhaps especially the advertisement for Suck, are such that they are per se obscene and that no one could possibly (looking at them in isolation) take any other view. It may well be that that is true. It may well be that if the matter had been put to the jury in that way on a proper direction they would have taken the view that the advertisement for Suck

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was obscene and, if they had, the result would have been that the whole magazine would have been treated as obscene. But having regard to the fact that the trial below was conducted on a wholly different basis, we do not think, although we have considered the matter with care, that it would be right here to apply the proviso on the basis that the items treated individually would necessarily have resulted in a conviction in respect of the magazine as a whole. In the result, therefore, so far as the 1959 Act counts, i e counts 2, 4 and 5, are concerned, the appeal is allowed and the convictions are quashed. Count 1 has gone anyway by reason of the verdict of the jury.

We are left only with the Post Office Act count, count 3. I have said really nothing about that so far. The essence of the offence there is sending through the post obscene or indecent matter. 'Obscene' here may have its ordinary meaning and therefore we are not troubled on this count with any difficulties about the jury having been wrongly directed as to the meaning of the word. It is not without importance to remember that when the jury returned their verdict on count 3 they were specifically asked whether they found the matter to be indecent or obscene or both, and they said both. So it is evident that they treated this as a case in which Oz on that definition was an obscene publication. There is on the face of it an appeal against this conviction as well, but counsel has had very little to urge on behalf of the appellants on this count, and indeed we can see no reason whatever which would justify the view that there is here any kind of material misdirection which would justify the quashing of the conviction. Accordingly, the conviction on count 3 must stand and the appeal is dismissed so far as it relates to count 3.

That means that all we are concerned with in the end is the proper sentence in the revised situation which now prevails. The penalty imposed by the learned trial judge for count 3 was six months in the case of each of the individual appellants, and a fine of £100 for the appellant company. Counsel for the appellants has drawn our attention to the fact, which is undoubtedly true, that prison sentences for offences of obscenity have been very rare in the past. What the reason for this is is something on which we do not wish to speculate, but it is true that to send a man to prison for offences in this classification has been a relatively unusual thing in the past. However, those of us who sit regularly in this court are only too familiar with the fact that when a particular offence becomes prevalent, and a wave of it appears, the only course which can be taken is to increase the sentences in order to adjust for the increase in the incidence of the offence. That is one of our responsibilities which we must exercise to the best of our ability. We would therefore like to make it quite clear in general terms that any idea that an offence under the Obscene Publications Act 1959 does not merit a prison sentence should be eradicated. There will be many cases in future in which a prison sentence is appropriate if the court imposing the sentence thinks fit, and any general impression to the contrary should not be retained. In this case having regard to the jury's verdict and having regard to all the other considerations to which I have referred, we are of the opinion that the sentence on count 3 must stand, but of course it will in fact be suspended because any sentence of this length is under the present law automatically a suspended sentence.

Accordingly, the result of the appeal on conviction will be that the conviction on count 3 is sustained. The sentences are retained but suspended for two years. The deportation recommendation, which I have omitted to mention, in respect of the appellant Neville will be cancelled, it being inappropriate to the offence of which he is eventually found guilty.

Appeals allowed in part. Convictions on counts 2, 4 and 5 quashed. Sentences on count 3 suspended for two years. Deportation order in respect of the appellant Neville set aside. Order for costs against the appellant company reduced to £50.

Solicitors: *Offenbach & Co* (for the appellants); *Director of Public Prosecutions* (for the Crown).

N P Metcalfe Esq Barrister.

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Appendix B

San Diego Union News Article
Dated April 3, 1973 67

Costa Mesa Daily Pilot
News Article Dated March 26, 1973 68

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San Diego, Calif.
Union
(Cir. D 269,813)

APR 3 1973

Allen's P. C. B. Est. 1888

School Suspends Paper Distributors

1661

San Diego Union Staff Dispatch

LAKESIDE — Two students have been suspended for distributing on the El Capitan High School campus an underground newspaper which has raised the eybrows of parents and administrators this year.

Principal William Davis said the publication, called Two Week Leak, uses obscene language and occasionally advocates law breaking, by such stories as telling how to make telephone calls without paying.

Parents at recent community conferences discussed the publication at length "and the general consensus is that the people are not happy with it," said Davis.

AROUND FOR YEARS

"There's been one of these newspapers for many years at our school that's been published intermittently. It's being published and distributed off-campus.

"We have two of them now, the most recent being one that takes directly the opposite view. It's a Christian-oriented view," Davis said.

The principal said he has suspended two students for distributing the underground newspaper on campus. One suspension is currently in force. He would not name the students involved.

POLICY EXISTS

"We have a district policy for distribution of materials on campus that follows the state guidelines on obscenity." He said the newspaper is distributed off-campus "down on the corner in front of the school."

"There is a small group of young people that feel this is their medium of communication. Some of it isn't bad at all. Some is quite objectionable to us," Davis said.

"We respect their right to do that, as long as they publish it off-campus. It's not within our province to tell them what to write. At the early part of this school year we had the newspaper submitted to us and we indicated to them the problems.

DIDN'T CHANGE IT

"They didn't want to change it. It's the same kind of material you find in the Free Press. Much of it is copied from those type of publications. Primarily the language is obscene." Davis said he has not seen any obscene pictures in the newspaper.

"We're caught in the middle. We're trying to be fair with the kids that operate it, and assure that they know their capability to publish off-campus.

"But we have to be very careful. If they do violate the district policy, we have to take action," he said.

Costa Mesa, Calif.
Daily Pilot
(Cir. D)

MAR 26 1973

Allen's P.C.B. Est. 1909

Newport Ban On Sex Papers Legally Shaky

By L. PETER KRUEG
Of the Daily Pilot Staff

Newport Beach City Attorney Dennis O'Neil today conceded that a city imposed ban on newsracks sales of two Los Angeles sex-oriented periodicals would be on shaky legal grounds.

"The legality of the city's actions might take judicial determination," O'Neil said.

"If the city decides to ban newsrack sales without a court order to determine they are obscene, it might not stand up," he said.

O'Neil is scheduled to meet with Police Chief B. James Glavas and City Manager Robert L. Wynn Tuesday to determine if Newport Beach will forbid the street sales of the Los Angeles Star and the Hollywood Press in an attempt to keep them out of the hands of minors.

"It's a value judgment thing the police department can make as 'experts' in that field," O'Neil said.

The Tuesday meeting is intended to determine if the city will issue a business license to Jose Ortega of Huntington Beach, distributor of the two off-beat publications.

"If we issue the permit with the condition that they not be sold on the street because they are harmful to minors, we'll just have to see what happens," O'Neil said.

Glavas, calling the newspapers "filth" gave every indication he intends to keep them out of newsracks.

"We have an obligation to protect the minds of minors," Glavas said. "To make this stuff readily accessible to persons under 18 is simply not doing the job society is supposed to do.

"We're going to restrict the sale from racks," he said. "We intend to offer the applicant the opportunity to obtain a license to distribute the publications in grocery stores and liquor stores where there is an adult in charge of the sale and can control the sale to adults."

Referring specifically to the Los Angeles Star, which has also been banned by the district attorney in unincorporated Orange County territory, Glavas said:

"It's got a lot of filth in it. It's absolute pornography. The only thing is that it somehow complies with the ridiculous ruling of the U.S. Supreme Court that says obscene material must be completely without redeeming social importance.

"It's got nine columns of absolute pornography and then one column on the clapper rail birds in Upper Newport Bay. That's the kind of paper it is."

Glavas' opinion of the publication echoed that of City Manager Wynn who earlier had labeled them "trash."

Attorneys for Ortega still could not be reached for comment on the apparent pending ban by the city. The proposed ban would be similar to the action taken by Huntington Beach councilmen earlier this month when they outlawed the street sales of the Los Angeles Free Press in their city. The Free Press is widely distributed on the streets of Newport Beach, however.

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